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NO. 06-112

In The Supreme Court Of The United States

HENRY TORROMEO and MDR CORPORATION,
Petitioners,

vs.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF *AMICUS CURIAE* FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF OF AMICUS CURIAE FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to the consent of the parties already filed with the Clerk of this Court, Franklin P. Kottschade submits this brief as *Amicus Curiae* in support of the Petitioners.[1]

INTEREST OF AMICUS CURIAE

Franklin P. Kottschade is a realtor and real estate developer from Rochester, Minnesota. He has been an active leader in associations of realtors and home builders at the national, state, and local level for many years, and an active participant in charitable and community projects.

Mr. Kottschade's interest in this case stems from his own personal experiences in a similar case recently. (*Kottschade v. City of Rochester*, 319 F.3d 1038 [8th Cir.], *cert. denied*, No. 02-1848 [2003].) He also appeared as *amicus curiae* in this Court in support of the Petitioners in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). All of these cases

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[1] Amicus states that his counsel authored this brief and Amicus paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than Amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

raise similar issues of state/federal court jurisdiction over regulatory taking cases. Counsel representing Mr. Kottschade here also represented him in both other cases.

Mr. Kottschade filed his suit directly in U.S. District Court, without attempting to "ripen" his case in state court, as described in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). Mr. Kottschade explained that he had done so because of a concern that taking the case first to state court would ultimately deprive him of any opportunity to have his federal constitutional issues heard in federal court. The 8th Circuit Court of Appeals agreed that this concern was "justly" held (319 F.3d at 1041), although it nonetheless held that his federal case was not ripe.

Just how "justly" he held that concern has been borne out by the 8th Circuit since then. It has indeed become emblematic of the lower court confusion aptly spotlighted in the Petition. A year after it decided Mr. Kottschade's case, it reviewed *Johnson v. City of Shorewood*, 360 F.3d 810 (8th Cir 2004). There, the property owner sued first in state court. After losing there, it sought federal court relief. Relief was denied because the state proceedings precluded further action. Earlier this year, the 8th Circuit decided *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006). There, after the property owner sued in state court, the city removed it to federal court. Once in federal court,

the city moved to dismiss, on the ground that the case — which had been brought to federal court by the *defendant* — was not yet ripe for federal litigation. The 8th Circuit agreed. (435 F.3d at 903.) The system is broken, and only this Court can fix it.

The decision below bears out Mr. Kottschade's concern, and he appears here as the proverbial "Exhibit A" to the adage, "you can't get here from there." Here, because the property owners had gone to state court, the courts below held that they were *legally precluded* from pursuing *any federal claims* in federal court.

Mr. Kottschade's fear expressed to the 8th Circuit proved unfortunately predictive here. After litigating in state courts, the Petitioners were held legally unable to proceed in federal court after they "ripened" their federal case as *Williamson County* directed.

Mr. Kottschade's concern about this aspect of access to federal courts for the litigation of federal constitutional takings issues also led him recently to testify in Congress about his experiences and the law's unfairness. His testimony was presented on June 8, 2006 before the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives in support of H.R. 4772, the "Private Property Rights Implementation Act of 2005."

Mr. Kottschade thus brings to this argument his experience in trying to litigate federal constitutional takings claims in federal court. He is a living, breathing example of what is wrong with *Williamson County* as it operates in reality.

SUMMARY OF ARGUMENT

The rule laid down in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), i.e., that a property owner does not have a "ripe" regulatory taking claim under the 5th and 14th Amendments to the United States Constitution until first seeking – and failing to obtain – redress under state law in state court, has caused jurisprudential havoc in the two decades of its existence. Even its most ardent supporters have conceded the lack of intellectual and legal soundness in its holding.

In its most recent opportunity to examine the rule, four Justices of this Court agreed that the rule is in sharp need of re-evaluation and perhaps should be discarded. (*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 340 [2005].) It is time for the full Court to join those four and end the anarchy set loose by *Williamson County*. Mr. Kottschade urges the Court to take this opportunity to do so promptly.

REASONS FOR GRANTING THE PETITION

I

WILLIAMSON COUNTY CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

The four concurring Justices in *San Remo* recognized this, questioning whether *Williamson County* "was correct in demanding that once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal

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2 *Chicago B.& Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

court." (*San Remo*, 545 U.S. at 340; Rehnquist, C.J., concurring.)

The *San Remo* concurrence put its finger on *Williamson County*'s flaw: *Williamson County* held that a taking is not complete until compensation is denied not just by the taking entity, but also by the state courts. No law mandates that result, and even *Williamson County*'s analysis does not support it.

Williamson County quite properly began with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided a method to obtain compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like the Town of Fremont at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the town can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[3]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[4] and nonpayment by the taker. When a municipal government — like Fremont's — conscripts private property into public service without any pretext of compensation, it violates the 5th Amendment. The

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[3] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

[4] As explained in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

presence or absence of a state remedy has no bearing on whether the malefactor did the deed.

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide.*" (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 [1986]; citation omitted; emphasis added.) At another point, the same opinion talks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, fn. 10 [1987]; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to

state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

Mandating suit in state court imports into the 5th Amendment a remedial requirement when the just compensation language is a limitation on government's inherent power, not an invitation to sue for payment,[5] and where the Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42

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5 See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).[6]

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[7]

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6 The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in Section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.)

7 *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

Nor are other constitutional rights treated that way.[8] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant.[9] (See *Monroe v. Pape*, 365

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8 *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. (E.g., *Preseault v. I.C.C.*, 494 U.S. 1 [1990].) That is all the Petitioners (and others like them) want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

9 The lone exception is habeas corpus, where all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata and full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)[10]

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit

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10 See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. The Town of Fremont was not in doubt about that claim. It simply chose not to honor it. Imposing on property owners (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown below, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

II

THE MORE RECENT DECISION IN *CITY OF CHICAGO*, RENDERED A DOZEN YEARS AFTER *WILLIAMSON COUNTY*, HAD TO HAVE A SUBSTANTIVE IMPACT ON THE "RIPENESS" PROCEDURE IN TAKINGS CASES.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. The complaint raised due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to. The statute gives the defendant the even-handed ability to invoke federal jurisdiction as well.

It somehow got overlooked that, as a land use plaintiff, the International College of Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* precluded it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under'

federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

Believing that the *City of Chicago* decision had to impact *Williamson County*, Mr. Kottschade asked the 8th Circuit to reconcile them and allow suit to proceed in federal court. After all, if the City of Chicago could remove its litigation to federal court on the ground that it could have been initiated there, then Frank Kottschade ought to be able to file suit there directly under the fair reciprocity theory underlying 28 U.S.C. § 1441(a).

The 8th Circuit acknowledged what it called an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, concluding that how to resolve the conflict "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being reminded of

Williamson County,[11] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[12] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[13] when necessary to clarify the implications of earlier decisions,[14] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[15] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[16] the Court has reviewed its earlier decisions and corrected its

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11 In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

12 *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

13 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

14 *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

15 *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

16 *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

own errors. Each of those factors applies to *Williamson County*.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court is one of those ideas that probably sounded good at a theoretical level. As it has been applied during the past two decades, however, it has been a nightmare. It has caused needless anguish to property owners (some of whom, like Mr. Kottschade, are filing amicus curiae briefs here to share their experiences and concerns with the Court). It has caused wastefully duplicative litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.[17]

Citizens, lawyers, and — particularly — busy trial judges don't work at a theoretical level. Of necessity, they are concerned with nuts and bolts, rather than casuistically parsing words and theories and attempting to fit unfamiliar concepts (like the state court ripeness rule) into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

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17 A collection of colorful critiques like "absurd," "shocking," "draconian," "fraud," "hoax," and "Kafkaesque" (and many more) may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urban Lawyer 671, 702-703 (2004).

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they deign to file in federal court, but also subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Constitutional rights deserve better.

Williamson County's state court litigation requirement needs to be overruled. It has become a jurisprudential poison pill, precluding determination of federal constitutional issues, rather than enabling meaningful decision.

Respectfully submitted,

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